**HIGH COURT OF CHHATTISGARH: BILASPUR**

**SB: HON'BLE SHRI JUSTICE VIJAY KUMAR SHRIVASTAVA**

**MISCELANEOUS APPEAL NO. 513/2004**

Appellant :
(Defendant No.1)

Banarsi,
S/o. Chandra Sao,
aged about 42 years
r/o. Salka,
Tehsil Surajpur,
Dist.Surguja, (CG).

Vs.

Respondents:

1) Shilochani
d/o. Shivmangal Koir,
age 40 years, r/o. village,
Salka, P.S. Surajpur,
Dist. Surguja (CG).
(Plaintiff)

2) State of Chhattisgarh
through Collector, Surguja,
(CG). (Proforma defendant No.2)

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PRESENT:

Shri A.K. Prasad, Counsel for appellant.
Shri J.K. Shastri, Counsel for respondent No.1.
Shri J.D. Bajpai, Govt. Advocate for respondent No.2/State.

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**O R D E R**

**( Passed on 25th April, 2005)**

Being aggrieved by the order passed in M.J.C.No.29/99 by Ist Additional Dist. Judge, Surajpur on 17/04/2004 rejecting the application under Order 41, Rule 21 of the C.P.C. (henceforth, "the Code"), this appeal has been preferred under Order 43, Rule 1 (t) of the Code.

2) A Civil Suit No. 137-A/89 for possession and permanent injunction was filed by plaintiff/respondent No.1 Shilochani against the appellant in the Court of Civil Judge, Class II, Surajpur. Vide judgment and decree dated 29/10/1991 the suit was dismissed. Being aggrieved by the judgment and decree passed by the trial Court, Civil Appeal No.10-A/1992 has been filed and the said appeal was decided ex parte on 29/08/1996 in favour of the plaintiff/respondent No.1. Appellant stating that he got the knowledge of ex parte decree on 29/10/1999, filed an application for setting aside the ex parte decree and re-hearing of the appeal under Order 41, Rule 21 of the Code on the ground that the notice of the appeal has not been served on him. Plaintiff/respondent No.1 denied the fact of service of notice and raised the question of limitation.

3) Learned Court below considering the evidence and material on record held that the Court properly proceeded ex parte, therefore, application filed by defendant No.1 (appellant) was rejected vide impugned order dated 17/04/2004.

4) On 23/03/1994 the Court ordered issuance of notice to respondent No.1 and fixed the case for 28/04/1994. On 28/04/1994 without taking into consideration the fact of service or non-service of notice on respondent No.1, the Court again ordered issuance of notice to respondent No.1 and fixed the appeal for 27/06/1994. On 27/06/1994 the Court held that a notice was issued to respondent No.1 and the same has been returned unserved with an endorsement that the wife of respondent No.1 refused to accept the notice. The said notice was issued for 28/04/1994 and

not for 27/06/1994. The Court held that the service of said notice is valid, proceeded ex parte against respondent No.1 and decided the appeal ex parte on 29/08/1996.

5) Banarsi (respondent No.1) who is appellant herein to prove that the notice has not been served on him, examined himself and other witnesses. Sukmanya (AW/2) is his wife who very specifically stated that she never refused to accept any notice and no one came to serve. Name of Mahesh as witness has been described in the service report, but Sukmanya (AW/2) and Chamru Prasad (AW/3) have clearly stated that no one named Mahesh lives in their village.

6) To contradict the said evidence, respondent No.1 herein Shilochani (NAW 1) although appeared as witness, but did not support the fact that notice was refused by Sukmanya, the wife of Banarsi. Neither the process server nor the witnesses named in the service report have been produced or examined.

7) From the evidence of Banarsi (AW/1), Sukmanya (AW/2 and Chamru Prasad (AW/3), it was established that no notice has been served on Banarsi in person nor any notice issued in the name of Banarsi, has been refused by his wife Sukmanya. Even the witness Mahesh whose name appeared in the service report does not reside in the concerned village. So far as knowledge is concerned, Banarsi on oath specifically stated that for the first time on 29/10/1999 he came to know about the judgment. He instructed his advocate for taking a copy of the judgment on 30/10/1999 and

received a copy thereof on 03/11/1999. From the record, it is apparent that the application was filed on 04/11/1999. To disbelieve the same nothing has been placed before the Court. Therefore, the application filed under Order 41, Rule 21 of the Code, is not time barred.

8) No other contentions have been raised during arguments.

9) The application filed by the present appellant under Order 41, Rule 21 of the Code is allowed. The impugned order passed by the Court below is set aside. The ex parte judgment and decree passed by the First appellate Court in Civil Appeal No. 10-A/1992 on 29/08/1996 is also set aside with a direction to readmit the said appeal for hearing and after affording opportunity of hearing to both the parties the First appellate Court shall decide the same afresh on its own merit.

10) Both the parties are directed to appear before the appellate Court, i.e., Ist Additional District Judge, Surajpur, Dist. Surguja on 20/06/2005.

Parties to bear their own costs of this appeal.

**Sd/-**
**V.K. Shrivastava**
**Judge**
25/04/2005

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